

UTILITIES DIVISION[199]

Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)“b.”

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to Iowa Code section 17A.4 and Iowa Code chapters 476 and 478, the Utilities Board (Board) gives notice that on May 20, 2013, the Board issued an order in Docket No. RMU-2012-0002, In re: Pole Attachments Rule Making [199 IAC Chapter 27] and Amendment to 199 IAC 15.5(2), “Order Adopting Amendment to 199 IAC 15.5(2) and Giving Notice of Proposed Amendments to 199 IAC 25.4,” that approved the adoption of an amendment to correct a citation in 199 IAC 15.5(2), stated that the Board would not adopt the proposed pole attachment rules in 199 IAC Chapter 27, and proposed amendments to 199 IAC 25.4 addressing pole attachments. An Adopted and Filed rule making for the amendment to 199 IAC 15.5(2) is published herein as **ARC 0781C**. The Board decided not to adopt rules addressing pole attachments as proposed in **ARC 0455C** and published in the Iowa Administrative Bulletin on November 14, 2012.

This Notice of Intended Action proposes to establish procedures and time frames for pole attachments for poles owned by electric and telecommunications utilities. The proposed amendments are designed to accomplish the goal of ensuring that pole attachments comply with the safety regulations in the Iowa Electrical Safety Code and address the concerns of the Iowa Utility Association (IUA) and the communications companies that filed comments regarding the proposed rules in **ARC 0455C**.

After a review of the comments regarding the pole attachment rules proposed in **ARC 0455C**, the Board has determined that it should not adopt the proposed pole attachment rules as a separate chapter and should not certify compliance with Federal Communications Commission (FCC) regulations in 47 CFR § 1.140 et seq. Comments from participants raised several concerns about the Board’s jurisdiction over the rates, terms, and conditions of pole attachments and suggested that the Board could address the safety concerns related to pole attachments with a more limited rule making. Since the primary intent of the proposed rules was to establish procedures that ensured pole attachments installed by communications companies and similar entities were in compliance with the Iowa Electrical Safety Code in 199 IAC Chapter 25, the Board has determined that it can address those safety issues more directly and efficiently with a more limited rule making than one that asserts jurisdiction over the rates, terms, and conditions of pole attachments in addition to safety.

Initial written comments addressing the proposed pole attachment rules were filed by CTIA-The Wireless Association® (CTIA), Cox Iowa Telecom, LLC (Cox), the Iowa Association of Electric Cooperatives (IAEC), Sprint Communications Company L.P., Sprint Spectrum L.P. d/b/a Sprint PCS, Nextel West Corp. d/b/a Nextel, and NPCR, Inc. d/b/a Nextel Partners (collectively, Sprint), Frontier Communications of Iowa, LLC (Frontier), Qwest Corporation d/b/a CenturyLink QC (CenturyLink), the IUA, and Mediacom Communications Corporation (Mediacom).

On February 12, 2013, the Board held an oral presentation to allow for comments regarding the proposed rules and to allow the Board to ask questions of the participants. On February 18, 2013, the Board issued an order allowing for additional written comments and providing an opportunity to respond to certain questions. Additional comments were filed by IUA, Frontier, the Consumer Advocate Division of the Department of Justice, CenturyLink, CTIA, Cox, and Mediacom.

The Board has reviewed the initial written comments, the transcript of the oral presentation, and the additional written comments. It appears from the comments that the Board was presented with two alternatives with regard to adopting rules to address pole attachments in Iowa. The first alternative is not to adopt the proposed rules in Chapter 27 and instead to propose amendments in Chapter 25 limited

to the safety of pole attachments, with time frames for notice, correction of violations, penalties, and dispute resolution procedures. The second alternative would be to adopt the proposed rules in Chapter 27 with certain revisions and certify to the FCC that the Board is asserting jurisdiction over the rates, terms, and conditions of pole attachments by communications providers on poles owned by electric and telecommunications utilities.

After consideration of the alternatives, the Board decided that the most effective course of action is the first alternative, in which the Board would not certify FCC compliance but would instead propose amendments that would establish additional requirements in Chapter 25 to ensure that pole attachments meet the safety requirements of the Iowa Electrical Safety Code.

The new amendments are designed to address many of the comments and suggested revisions offered by the participants, especially the communications companies. The primary change from the previously proposed rules is the removal of any reference to rates, terms, and conditions for pole attachment agreements. The proposed amendments do not require that pole attachment agreements be in writing and do not make any reference to rates, terms, or conditions in a pole attachment agreement. Pole attachment agreements will remain subject to the jurisdiction of the FCC.

There appears to be general consensus that the Board has jurisdiction over the safety of pole attachments. Mediacom provided an extensive analysis of the FCC's deference to state and local jurisdiction in this area. Frontier raised the issue of whether the Board has jurisdiction over the excess space on utility poles. No other participant supported Frontier's position and, as MidAmerican stated, the Board has asserted jurisdiction over the excess pole space in utility rate cases by considering the revenue and expenses related to the excess pole space as part of revenue requirement calculations. In addition, the Maryland case cited by Frontier in support of its position interpreted Maryland law regarding Maryland Public Service Commission (PSC) jurisdiction over excess pole space and, as the Maryland court stated, "Likewise, the instant case turns on the powers granted to the PSC under the PSC Law. Consequently, we do not find the decisions from courts of other jurisdictions helpful." Chesapeake and Potomac Telephone Company of Maryland v. Maryland/Delaware Cable Television Association, Inc., et al., 530 A.2d 734, 741 (Md. Ct. App. 1987). The Maryland court cited decisions in four states that reached the same conclusion about excess pole space and in seven states that reached the opposite conclusion. Id. at 740. The Maryland case provides little guidance in interpreting the Iowa statute, and the Board has historically asserted jurisdiction of excess pole space for ratemaking purposes and for safety purposes. The Board considers this to be the correct interpretation of Iowa Code chapter 476.

The Board has retained the list of entities that are covered by the pole attachment requirements to address the original intent of the rule proposed by the IUA. The intent was to establish requirements for pole attachments from communications and other non-utility entities which now have a right pursuant to federal law to attach to utility poles. One of the primary concerns expressed by the IUA is that as new entities enter the communications market and need to install facilities on electric poles and other utility poles, there are no procedures or requirements in the current rules that the utility companies may use to enforce compliance with the Iowa Electrical Safety Code.

In the proposed amendments, the Board has added electric lines that are not owned by the pole owner as part of the definition of "pole attachment." This change was suggested as part of the balance sought by the communications companies. In addition, by placing the proposed new provisions in Chapter 25 and focusing the requirements specifically on the safety of pole attachments, the Board has removed the exemptions for cooperatively owned utilities and municipals or other government-owned utilities. The safety rules in Chapter 25 apply to all electric and telephone utilities and include electric cooperatives and municipals. The proposed amendments will apply to poles owned by cooperatives and municipals as well as to pole attachments owned by cooperatives, municipals, and other utilities to poles owned by different electric or telecommunications utilities.

In the proposed amendments, the Board will retain the language addressing the actions that may be taken if the violation of the Iowa Electrical Safety Code could reasonably be expected to affect life or property. There appeared to be no disagreement about the need to take action in these circumstances. Interested parties made suggestions that, when the pole owner takes action because the pole occupant has not responded immediately to the violation, the amendments should provide that the pole occupant

given notice of the violation may challenge ownership of the pole attachment and that any disagreement about either the ownership of the pole attachment or the cost of the corrective action should be one of the listed reasons that a complaint could be filed with the Board. The proposed amendments reflect these suggestions. In addition and as suggested by some of the comments, the Board has proposed a provision that requires reimbursement by the pole owner when corrective action is taken by a pole occupant and it is later determined that the pole owner caused the violation.

The Board has retained the requirement that requests to attach to poles be made in writing. This requirement provides a way for the pole owner to know what entities are attaching to the poles and provides an opportunity for the pole owner to explain to the pole occupant the requirements for complying with the Iowa Electrical Safety Code when installing the attachment. This requirement should also provide the pole owner with contact information for the pole occupant if a violation is found at some later time.

The Board has not retained the requirement that there be a written agreement between the pole owner and the pole occupant since, according to Mediacom, the FCC requires a written agreement before make-ready work is commenced by the pole owner. Implementation of Section 224 of The Act; A National Broadband Plan for Our Future, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, (Adopted 4/7/11). The FCC order has this requirement, and the rates, terms, and conditions for pole attachments will remain subject to FCC jurisdiction and regulations, including the requirement for a written agreement. The removal of the requirement for a written agreement addresses the concerns of the communications companies that any rules adopted should not interfere with existing pole attachment agreements.

The Board has retained the requirement that the pole owner notify the pole occupant in writing of any alleged violations of the Iowa Electrical Safety Code or provide notification by any other means agreed to between the pole owner and pole occupant. The Board has added language to address Mediacom's concerns about notification regarding multiple violations at the same time. The proposed provision concerning multiple violations allows the pole occupant additional time when the pole occupant receives notice of 25 or more violations at one time. The Board considered the suggestion to give advance notice of multiple violations; however, the Board determined that giving additional time accomplished the same goal without additional requirements.

The Board has retained the 30-day written response time for pole occupants to respond to notice of alleged violations, unless the pole occupant has received a list of 25 or more alleged violations, which would allow for a longer response time. The pole occupant must respond in writing unless the pole occupant has reached agreement with the pole owner for some other form of communication. The Board has retained the requirement that the response indicate a plan for corrective action, state that the violation has been corrected, assert that a violation belongs to a different pole occupant, or dispute that there is a violation. The Board has retained the requirement that the corrective action be taken within 90 days of receipt of the notice, unless the notice was for 25 or more alleged violations. For 25 or more alleged violations, the pole occupant will have 180 days to complete any corrective action. The time frames may be extended for good cause. The Board has included as good cause a disagreement that a violation has occurred, a claim that the correction is not possible within the time frames due to events beyond the control of the pole occupant, or a claim that a different pole occupant is responsible for the violation. The Board has also included a provision to the effect that the pole owner and pole occupant may agree to a longer period of time if necessary.

The Board has retained the dispute resolution provisions from the original proposed rules and has included language that both pole owners and pole occupants may use the dispute resolution procedures. The Board has limited the assessment of civil penalties to the provisions of Iowa Code section 476.51, as suggested by some of the commenters.

It was suggested in comments that an exception be established for aerial drops. The Board has not included such an exception in the proposed amendments. Any difference in notice requirements for aerial drops should be negotiated between the pole owner and the pole occupant.

The order approving this Notice of Intended Action can be found on the Board's Electronic Filing System (EFS) Web site, <http://efs.iowa.gov>, in Docket No. RMU-2012-0002.

Pursuant to Iowa Code section 17A.4(1)“a” and “b,” any interested person may file a written statement of position pertaining to the proposed amendments. The statement must be filed on or before July 2, 2013. The statement should be filed electronically through the Board’s EFS. Instructions for making an electronic filing can be found on the EFS Web site at <http://efs.iowa.gov>. Any person who does not have access to the Internet may file comments on paper pursuant to 199 IAC 14.4(5). An original and ten copies of paper comments must be filed. Both electronic and written filings shall comply with the format requirements in 199 IAC 2.2(2) and clearly state the author’s name and address and make specific reference to this docket. All paper communications should be directed to the Executive Secretary, Iowa Utilities Board, 1375 E. Court Avenue, Room 69, Des Moines, Iowa 50319-0069.

An opportunity for interested persons to present oral comments on the proposed amendments will be held at 8:30 a.m. on July 12, 2013, in the Board’s hearing room at the address listed above. Persons with disabilities who require assistive services or devices to observe or participate should contact the Board at (515)725-7334 at least five days in advance of the scheduled date to request that appropriate arrangements be made.

After analysis and review of this rule making, the Board tentatively concludes that the proposed amendments, if adopted, will have a beneficial effect on the safety and reliability of electric service in Iowa. Reliable electric service is a necessity for economic development, so the proposed amendments will have a beneficial effect on jobs in Iowa, although that effect cannot be quantified.

These amendments are intended to implement Iowa Code section 17A.4 and Iowa Code chapters 476 and 478.

The following amendments are proposed.

Amend rule 199—25.4(476,478) as follows:

199—25.4(476,478) Correction of problems found during inspections and pole attachment procedures.

25.4(1) Corrective action shall be taken within a reasonable period of time on all potentially hazardous conditions, instances of safety code noncompliance, maintenance needs, potential threats to safety and reliability, or other concerns identified during inspections. Hazardous conditions shall be corrected promptly. In addition to the general requirements stated in this subrule, pole attachments shall comply with the specific requirements and procedures established in subrule 25.4(2).

25.4(2) To ensure the safety of pole attachments to poles owned by utilities in Iowa, this subrule establishes requirements for attaching electric lines, communications lines, cable systems, video service lines, data lines, wireless antennae and other wireless facilities, or similar lines and facilities that are attached to the excess space on poles owned by utilities.

a. Definitions. The following definitions shall apply to this rule.

“Pole” means any pole owned by a utility that carries electric lines, communications lines, cable systems, video service lines, data service lines, wireless antennae or other wireless facilities, or similar lines and facilities.

“Pole attachment” means any electric line, communication circuit, cable system, video service line, data service line, antenna and other associated wireless equipment, or similar lines and facilities attached to a pole or other supporting structure subject to the safety jurisdiction of the board pursuant to the Iowa electrical safety code, 199—25.2(476,476A,478).

“Pole occupant” means any electric utility, telecommunications carrier, cable system provider, video service provider, data service provider, wireless service provider, or similar person or entity that constructs, operates, or maintains pole attachments as defined in this chapter.

“Pole owner” means a utility that owns poles subject to the safety jurisdiction of the board pursuant to the Iowa electrical safety code, 199—25.2(476,476A,478).

b. Compliance with Iowa electrical safety code. Pole attachments to poles shall be constructed, installed, operated, and maintained in compliance with the Iowa electrical safety code, 199—25.2(476,476A,478), and the requirements and procedures established in this subrule.

c. Requests for access to poles. A pole owner shall provide nondiscriminatory access to poles it owns. Request for access to poles by an electric utility, telecommunications carrier, cable system

operator, video service provider, data service provider, wireless service provider, or similar person or entity shall be made in writing or by any method as may be agreed upon by the pole owner and the person or entity requesting access to the pole. If access is denied, the pole owner shall explain in detail the specific reason for denial and how the denial relates to reasons of lack of capacity, safety, reliability, or engineering standards.

d. Notification of violation. A pole owner shall notify in writing a pole occupant of an alleged violation of the Iowa electrical safety code by a pole attachment owned by the pole occupant, or may provide notice by another method as may be agreed upon by the parties to a pole attachment agreement. The notice shall include the address and pole location where the alleged violation occurred, a description of the alleged violation, and suggested corrective action.

e. Corrective action.

(1) Upon receipt of notification from a pole owner that the pole occupant has one or more pole attachments in violation of the Iowa electrical safety code, the pole occupant shall respond to the pole owner within 30 days, or 60 days if 25 or more alleged violations are received at one time, in writing or by another method as may be agreed upon by the pole occupant and the pole owner. The response shall provide a plan for corrective action, state that the violation has been corrected, indicate that the pole attachment is owned by a different pole occupant, or indicate that the pole occupant disputes that a violation has occurred. The violation shall be corrected within 90 days of the date notification is received, or 180 days if 25 or more alleged violations are received by the pole occupant at one time, unless good cause is shown for any delay in taking corrective action. A disagreement that a violation has occurred, a claim that correction is not possible within the specific time frames due to events beyond the control of the pole occupant, or a claim that a different pole occupant is responsible for the alleged violation will be considered good cause to extend the time for taking corrective action. The pole occupant and pole owner may also agree to an extension of the time for taking corrective action. The pole owner and pole occupant shall cooperate in determining the cause of a violation and an efficient and cost-effective method of correcting a violation.

(2) If the violation could reasonably be expected to endanger life or property, the pole occupant shall take the necessary action to correct, disconnect, or isolate the problem immediately upon notification. If immediate corrective action is not taken by the pole occupant for a violation that could reasonably be expected to endanger life or property, the pole owner may take the necessary corrective action and the pole occupant shall reimburse the pole owner for the actual cost of any corrective measures. If the pole owner is later determined to have caused the violation and the pole occupant has taken corrective action, the pole owner shall reimburse the pole occupant for the actual cost of the corrective action. Disputes concerning the ownership of the pole attachment should be resolved as quickly as possible.

f. Negotiated resolution of disputes. Parties to disputes over alleged violations of the Iowa electrical safety code, the cause of a violation, the pole occupant responsible for the violation, the cost-effective corrective action, or any other dispute regarding the provisions of subrule 25.4(2) shall attempt to resolve disputes through good-faith negotiations. Parties may file an informal complaint with the board pursuant to 199—Chapter 6 as part of negotiations.

g. Complaints. Complaints concerning the requirements or procedures established in subrule 25.4(2), including access to the excess pole space or alleged violations of the Iowa electrical safety code, may be filed with the board by pole owners or pole occupants pursuant to the complaint procedures in 199—Chapter 6.

h. Persons found to have violated the provisions of subrule 25.4(2) may be subject to civil penalties pursuant to Iowa Code section 476.51 or to other action by the board.